Supreme Court, U.S.
FILED

931435 FEB 22 1994

No. _____
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA,

Petitioner,

v.

LOIS JACOBS, D.D.S.,

Respondent.

Petition For A Writ Of Certiorari To The SUPREME COURT OF THE STATE OF OKLAHOMA

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February, 1994

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February, 1994

The Petitioner the Oklahoma Board of Governors of Registered Dentists petitions for a writ of certiorari to review the November 23, 1993 decision of the Supreme Court of the State of Oklahoma.

Question Presented

Whether the First Amendment Precludes a State Regulatory Board From Prohibiting the Use of the Term "Specialist" In Advertising by Individuals Who Do Not Hold Specialty Licenses And Who Have Not Been Certified as Specialists by any Other Agency or Organization.

Parties to the Proceedings

The Petitioner, the Board of Governors of Registered Dentists of the State of Oklahoma is the regulatory agency responsible for regulating the practice of dentistry in Oklahoma. The Respondent, Lois Jacobs, D.D.S., is a licensed general dentist who was reprimanded by the Petitioner for representing herself as a specialist when she did not hold a specialty license.

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Opinions Below

The opinion of the Supreme Court of the State of Oklahoma was not published and is reprinted as Exhibit A to the Appendix to this Certiorari Petition. The August 10, 1993 opinion of the Court of Appeals was not published and is reprinted as Exhibit B in the Appendix to this Certiorari Petition. The September 13, 1993 Oklahoma Court of Appeals opinion denying rehearing in this case is attached as Exhibit C. The opinion of the District Court for Tulsa County, Oklahoma was not published and is reprinted as Exhibit D to the Appendix to this Certiorari Petition. The opinion of the Petitioner the Oklahoma Board of Governors of Registered Dentists of the State of Oklahoma was not published and is reprinted as Exhibit E to the Appendix to this Certiorari Petition.

Jurisdiction

The decision of the Supreme Court of the State of Oklahoma was filed on November 23, 1993. The Petitioner the Oklahoma Board of Governors had jurisdiction over this matter pursuant to Okla. Stat. tit 59 § 328.32. The District Court for Tulsa County, Oklahoma had jurisdiction over this matter pursuant to Okla. Stat. tit. 75 § 318. The Supreme Court of the State of Oklahoma and the Oklahoma Court of Appeals had jurisdiction over this matter pursuant to Okla. Stat. tit. 12 § 952 and Okla. Stat tit. 20 § 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

Statutory and Regulatory Provisions Involved

This case involves the Oklahoma Dental Act, Okla. Stat. tit. 59 §§ 328.1, et seq., and particularly § 328.22 and 328.32. These sections of the Oklahoma Dental Act are reprinted as Exhibit F to the Appendix to this Petition.

Statement of the Case

This case arises out of an advertisement placed in the general dentistry section of the Southwestern Bell Yellow Pages for Greater Tulsa by the Respondent, Lois Jacobs, a licensed dentist. Among other things, the advertisement identified Dr. Jacobs as a "dentist anesthesiologist" and an "Advanced University & Hospital Trained Specialist in Anesthesiology."

In May, 1991, the Petitioner the Oklahoma Board of Governors of Registered Dentists (the Dental Board) received a citizen's complaint alleging that the subject advertising was false and misleading. Subsequently, the Dental Board conducted an investigation and issued a formal Complaint against Dr. Jacobs alleging several violations of the

Oklahoma Dental Act, Okla. Stat. tit. 59, §§ 328.1, et seq. In particular, the Board alleged that in representing herself as a specialist in dental anesthesiology when she did not have a license in such a specialty, Dr. Jacobs violated the provisions of the Dental Act that prohibit such representations by individuals not holding specialty licenses. See Okla. Stat. tit. 59 § 328.22.

On November 9, 1991, the Dental Board conducted a hearing on the formal complaint against Dr. Jacobs. At that hearing, the Dental Board heard testimony that neither the Board's rules nor the American Dental Association recognizes specialty within dentistry in the field of anesthesiology. In addition, the Board heard testimony that although Dr. Jacobs had received training in anesthesiology, no university, society, organization, or regulatory board had certified her as a

specialist in anesthesiology. In particular, Dr. Jacobs responded as follows to the Dental Board's special prosecutor:

Q. Do any societies or organizations, that you are a member of, recognize you as a specialist in anesthesiology?

A. No.

Q. And you're not certified by any society or professional organization as a specialist in dentist anesthesiology?

A. No.

At the conclusion of the hearing, the Dental Board found Dr. Jacobs guilty of violating both Okla. Stat. tit. 59, § 328.32(g) (dishonorable or unprofessional conduct) and § 328.32(i) (holding herself out as especially qualified in a branch of dentistry in which she does not have a specialty license).

The Dental Board found that Dr. Jacobs violated these provisions by holding herself out as a dentist

anesthesiologist and as a specialist and by stating that her services were available at "your own dentist office". In light of these violations, the Board formally reprimanded Dr. Jacobs. The Dental Board also placed Dr. Jacobs' dental license on probation for a period of two years and directed her to comply with all provisions of the state Dental Act and the Dental Board's rules during the probationary period.

Following the Dental Board's decision, Dr. Jacobs appealed to Tulsa County District Court. The Tulsa County District Court reversed the Dental Board's decision, holding that the statements in the subject advertisement were protected by the First Amendment to the United States Constitution. Subsequently, the Oklahoma Court of Appeals affirmed the Tulsa County District Court's decision.

The Court of Appeals subsequently denied the Dental Board's Petition for Rehearing.

After reviewing this decision, the Dental Board filed a petition for a writ of certiorari in the Supreme Court of the State of Oklahoma. On November 23, 1993, in a 5-4 decision, the Oklahoma Supreme Court denied the Dental Board's petition.

Reasons for Granting the Writ

In recent years, this Court has decided a number of cases regarding the extent to which states may regulate professional advertising without violating practitioners' First Amendment rights. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); In Re R.M.J., 455 U.S. 191 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Nevertheless, this Court has not finally determined to what extent state regulatory authorities may properly prohibit the use of the term "specialist", particularly in instances such as the one at bar in which no certifying body has recognized a practitioner as a "specialist". In addition, state and federal courts have reached conflicting conclusions regarding this issue. Accordingly, this Court should grant this

Petition for a Writ of Certiorari to resolve this important question.

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STATE LICENSING BOARDS MAY PROHIBIT THE USE OF THE TERM "SPECIALIST" BY PRACTITIONERS WHO HAVE NOT BEEN AS CERTIFIED AS SPECIALISTS BY ANY OTHER AGENCY, SOCIETY, OR PROFESSIONAL ORGANIZATION.

In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), this Court concluded that state commission had violated an attorney's First Amendment rights by imposing disciplinary action against him for stating on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy. However, in reaching the conclusion, this Court noted that the attorney's certification statement was literally true. This Court wrote, "The facts stated on Petitioner's letterhead are true and verifiable. It is undisputed that NBTA

has certified Petitioner as a civil trial specialist and that three states have licensed him to practice law." 496 U.S. at 100.

In contrast to Peel, in the case at bar, Dr. Jacobs has admitted that no societies or organizations of which she is a member recognize her as a specialist in dental anesthesiology and that she has not been certified by any society or professional organization as such a specialist. To be sure, the record indicates that Dr. Jacobs has received education and training in the field of anesthesiology and that she does belong to several professional anesthesiology organizations. Nevertheless, the term "specialist," constitutes Dr. Jacobs own subjective assessment of her credentials.

This case thus affords this Court an opportunity to clarify the extent to which state licensing boards may prohibit the

use of the term "specialist" by individuals such as Dr. Jacobs who confer that designation upon themselves. Given the emphasis placed by the Peel opinion on the literal truth of the attorney's statement of specialty certification in his letterhead, it would seem that state licensing boards might indeed be able to limit or prohibit the use of the term "specialist" when no certifying body has conveyed that designation upon a practitioner. However, in the instant case, the Oklahoma Court of Appeals and the Oklahoma Supreme Court read this Court's decisions to prohibit such a restriction. Since a number of state licensing boards issue specialty licenses and regulate the practice of specialties within various professions, resolution of this question will provide needed guidance to state licensing boards in regulating the use of the term "specialist". See

Peel, 496 U.S. at 103 n.11 (discussing certification of specialties by state bar associations and state medical boards).

This Court should thus grant certiorari to resolve this important question.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG LOWER STATE AND FEDERAL COURTS REGARDING THE DEGREE TO WHICH STATE LICENSING BOARDS MAY PROPERLY RESTRICT THE USE OF THE TERM "SPECIALIST" AND ANALOGOUS TERMS AND PHRASES RELATING TO PROFESSIONAL PRACTICE.

Applying the decisions of this Court, lower state and federal courts have reached contrasting conclusions as to the extent to which state licensing boards may properly restrict the use of the term "specialist" and analogous terms and phrases. For example, in Parmley v. Missouri Dental Board, 719 S.W.2d 745 (Mo. 1986) the Missouri Supreme Court considered a constitutional challenge similar to the one advanced by Dr. Jacobs

in this case. In Parmley, a dentist holding a general license argued that the Missouri statute that precluded him from advertising a specialty in pedodontics violated his First Amendment right to engage in commercial speech. In rejecting Dr. Parmley's argument, the Missouri court first noted that "the state has a substantial and long-recognized interest in maintaining quality medical care for residents; this of necessity calls for some mechanism by which to police the ranks of health professionals to sustain a chosen level of competence among them." 719 S.W.2d at 751.

The court further noted that Missouri's limiting the right to hold oneself out as a specialist to those possessing a specialty license was a reasonable means of protecting the dental health of the public. Most importantly, the court held that because of the

potential deception involved in using terms such as "specialist," Missouri's blanket prohibition of the use of the term by unlicensed individuals was not overly restrictive. The court stated:

> Similarly "specialist" and like terms bear no reliable and intrinsic meaning; the content of a specialty is tied to the educational or other requirements which qualify a professional to hold himself out as one who specializes. Bereft of standard, the term still may project a high degree of profession on its face, but the underlying qualification is subject to the whims of the user. Thus, to permit this sort of information to "flow freely" would in essence keep consumers ignorant of crucial information which they must be able to rely on in choosing a dentist for their children. . . . The general public requires some uniform standard of minimal competence and the ability to rely on <u>each and every</u> representation that a particular dentist in fact qualifies as a specialist in pedodontics.

719 S.W. 2d at 753 (citations omitted). The <u>Parmley</u> court also noted that a state Dental Board was entitled to enforce this

general prohibition without reviewing the credentials of each unlicensed person who sought to advertise to determine if he or she actually qualified as a specialist. 719 S.W.2d at 753.

Similarly, in a recent decision, the Oklahoma Court of Appeals has rejected a First Amendment challenge to a state board's restrictions on the way in which a practitioner may describe his qualifications. In Steelman v. Oklahoma State Board of Medical Licensure and Supervision, 824 P.2d 1142 (Okla. App. 1992) a licensed physician requested permission to hold himself out as "board certified by the American Board of Bariatric Medicine." A duly promulgated rule of the Oklahoma Board of Medical Licensure provides that physicians may claim to be "board certified" only if they have completed the requirements for certification by a member board of the

organization of American Board of Medical Specialties or by an organization found by the licensure board to be equivalent thereto. The Board concluded that Dr. Steelman did not possess credentials equivalent to Board certification by a member board of the American Board of Medical Specialties and therefore was not entitled to hold himself out as Board certified by the American Board of Bariatric Medicine.

Dr. Steelman then appealed the Medical Licensure Board's decision, arguing that he had a First Amendment right to hold himself out as Board certified under the First Amendment. Applying this Court's commercial speech decisions, the Oklahoma Court of Appeals rejected Dr. Steelman's challenge. It concluded:

> While Steelman is entitled to commercial free speech, the right is not absolute. The Board, as an arm of the state seeking to protect the public's health and safety, may make reasonable restrictions on Steelman's right to advertise himself as "Board certified". He may not so advertise himself, when he has not met the reasonable requirements set by the Board to do so.

824 P.2d at 1144-45.

The reasoning of Parmley and Steelman has been followed by numerous other courts. See e.g., Kale v. Department of Health and Environmental Control, 391 S.E.2d 573 (S.C. 1990), upholding regulation preventing chiropractors from describing facility as a "hospital" because the term "chiropractic hospital" is deceptive); Accountant's Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) (upholding statute prohibiting non-licensed individuals from using the term "public accountant" because "some members of the public would believe the title has

the state's imprimatur"); Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466 (9th Cir. 1983) (upholding state regulation barring doctor of osteopathy from describing himself as M.D. despite the fact that osteopath claimed that his personal philosophy of medicine was best reflected by the title "M.D."). Barnett v. Maryland Board of Dental Examiners, 444 A.2d 1013 (Md. 1982) (holding that state dental board may prohibit the use of the term "polydontics" because it connotes a dental specialty).

In contrast to the Missouri Supreme Court's decision in Parmley, in this case the Oklahoma Court of Appeals and the Oklahoma Supreme Court have determined that a state licensing board may not properly prohibit the use of the term "specialist" by an individual licensed as a general dentist but not as a specialist. The Sixth Circuit has reached a conclusion

that is similar to the Oklahoma courts and that contrasts to the Parmley and Barrett decisions. See Parker v. Commonwealth of Kentucky Board of Dentistry, 818 F.2d 504 (6th Cir. 1987) (concluding, inter alia, that a dental board may not prohibit a general dentist's use of the term "orthodontics" in an advertisement).

This case thus presents this Court with an opportunity to resolve a conflict between the courts regarding the extent to which a state regulatory board may restrict the use of "specialist" and analogous terms.

Conclusion

For the reasons set forth above, this Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA

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Respondent.

Appendix to Petition For A Writ Of Certiorari To The SUPREME COURT OF THE STATE OF OKLAHOMA

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February, 1994

EXHIBIT A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Tuesday, November 23, 1993

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

79,315 Lois Jacobs, D.D.S. v. The Board of Governors of Registered Dentists of the State of Oklahoma.

Petition for certiorari denied.

CONCUR: Hodges, C.J., Hargrave, Wilson, Kauger Summers, J.J.

DISSENT: Lavender, V.C.J., Simms, Opala, Watt, J.J.

APPENDIX A-2

EXHIBIT B

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

LOIS JACOBS, D.D.S., Appellee,	)	
v.	)	No. 79,315
THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA, Appellant.	)	NOT FOR PUBLICATION

Appeal from the District Court of Tulsa County, Oklahoma (D.C. No. CJ-91-5201)

The Honorable Donald C. Lane, Trial Judge.

Susan B. Loving
Attorney General of Oklahoma
Rabindranath Ramana
Assistant Attorney General
Oklahoma City, Oklahoma - For Appellant

Sarah Sheperd Brandon
Tulsa, Oklahoma

James E. Frasier
J. Townley Price
Tulsa, Oklahoma - For Appellee

James C. Thomas
Tulsa, Oklahoma - Amicus Curiae American Society of Dentist Anesthesiologists

APPENDIX A-3

MEMORANDUM OPINION

TAYLOR, P.J.

The Board of Governors of Registered Dentists ("Board of Governors" or "Board") seeks review of an order of the trial court that reversed the Board's finding that Dr. Jacobs was guilty of unprofessional conduct by holding herself out as a specialist in dental anesthesiology.

The uncontroverted facts are that Dr. Jacobs has been a licensed dentist in Oklahoma since 1980. After graduating from dental college, Dr. Jacobs successfully completed a two-year medical residency in anesthesia at the University of Iowa Hospitals and Clinics. Dr. Jacobs is the only dentist in Oklahoma having completed a medical residency in anesthesia. In addition, she is a Fellow in General Anesthesia of the American Dental Society of

Anesthesiology (ADSA). The Board of Governors recognizes that a Fellow in General Anesthesia of the ADSA has special training and experience in the use of anesthesia in dentistry.

In 1980, Dr. Jacobs came to Oklahoma to be Director of Anesthesia at Bass Memorial Hospital in Enid. The following year she moved to Tulsa to join the faculty of Oral Roberts University, where she had received appointments in the College of Dentistry and College of Medicine. When the College of Dentistry closed in 1986, Dr. Jacobs entered private practice in Tulsa. Her dental practice consists primarily of going to one dentist's office where she administers anesthesia and monitors the patient while the other dentist performs the necessary dental procedures.

APPENDIX A-5

When Dr. Jacobs entered private practice in 1986, she placed an advertisement in the Yellow Pages of the telephone directory under the heading, "General Dentists." At the bottom of the ad the following statement appears: "Advanced University & Hospital Trained Specialist in Anesthesiology." This ad was renewed each year.

In 1991, the Board of Governors received a complaint from a Tulsa dentist. Based on this complaint, the Board issued a formal Statement of Complaint and Notice of Hearing that was served on Dr. Jacobs.

At the conclusion of the hearing, the Board found that neither the Oklahoma Dental Act nor the American Dental Association recognized a specialty within dentistry in the field of anesthesiology. The Board further found that by holding herself out as a specialist in anesthesiology without a

special license Dr. Jacobs violated 59 O.S.1991, § 328.32(g) and (i) and was guilty of dishonorable and unprofessional conduct. Dr. Jacobs was formally reprimanded and placed on two years probation.

Dr. Jacobs filed a timely appeal to the District Court of Tulsa County pursuant to 59 O.S.1991, § 328.43. After receiving the parties' briefs and hearing oral arguments, the trial court reversed the Board's Order, expunged the record and fully restored Dr. Jacobs' rights. The trial court also found that portion of Dr. Jacobs' advertisement stating that she was an "Advanced University & Hospital Trained Specialist In Anesthesiology" constituted commercial speech protected by the First Amendment to the United States Constitution and the Constitution of the State of Oklahoma.

It is from this order the Board appeals arguing two propositions of error: First, that Dr. Jacobs' advertisement is not constitutionally protected speech; and second, that the Board's decision is supported by substantial evidence and should be affirmed.

The Board's reliance on Parmley v. Missouri Dental Board, 719 S.W.2d 745 (Mo. 1986), is misplaced. Parmley maintained that the Missouri statute that denied him the right to advertise a specialty in pedodontics, without a license in that specialty, placed an unconstitutional burden on his First Amendment rights. The court held that the statute advanced important state and public interests in maintaining a chosen level of competence of health professionals and that Parlmey's First Amendment rights were not burdened to a

significant extent by the regulatory framework.

In the case at hand, Dr. Jacobs' advertisement did not state she was a specialist in one of the seven specialties recognized by the Oklahoma Dental Act, but that she was specially qualified in a branch of dentistry for which there is no recognized specialty.

In Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992), the court held that as long as commercial speech describes lawful activity, is truthful, and is not fraudulent or misleading it is entitled to the protections of the First Amendment. There is nothing in the record before us to indicate that Dr. Jacobs' inclusion of the language that she was specially qualified as a dental anesthesiologist was false, misleading or deceptive.

To regulate commercial speech which is not misleading a state must demonstrate a substantial interest and the regulation must be narrowly drawn to meet that interest. In re R.M.J., 455 U.S. 191 (1982). Here, the Board made no finding that any potential patient or person was actually misled or deceived by Dr. Jacobs' advertisement. Rather, it ruled as a matter of law that Dr. Jacobs' claim of being a university - and hospital - trained specialist was misleading absent an official state certification in dental anesthesiology.

Information regarding certification and specialties facilitates the consumer's access to dental services. The preferred remedy is more disclosure, not less. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

We find the disclosure of information, such as that on Dr. Jacobs' advertisement in

the Yellow Pages of the telephone directory, is protected by the First amendment. Because of our disposition of this issue, we find it unnecessary to address the Board's remaining proposition of error.

Accordingly, the order of the District Court reversing the findings and order of the Board of Governors is AFFIRMED. BRIGHTMIRE, J., and STUBBLEFIELD, J., concur.

August 10, 1993.

APPENDIX A-11

EXHIBIT C

IN THE COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

79,315 LOIS JACOBS, D.D.S., Appellee, v. THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA, Appellant.

Appellant's Petition for Rehearing is denied.

Done in Conference this 10th day of September, 1993.

Joe C. Taylor, Presiding Judge

APPENDIX A-12

EXHIBIT D

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY, STATE OF OKLAHOMA

LOIS JACOBS, D.D.S.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CJ-91-5201
	)	
THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER

NOW on this 25th day of February, 1992, this cause came on to be heard before Judge Donald C. Lane, Judge of the District Court in and for Tulsa County, Oklahoma. The Petitioner appeared in person and by her attorneys, James E. Frasier, J. Townley Price, and Sarah S. Brandon. The Board of Governors of Registered Dentists of the State of Oklahoma appeared by its attorneys, Special Prosecutor Stephen R. Clark and

Assistant Attorney General of Oklahoma, Rabindranath Ramana.

Petitioner Lois Jacobs, D.D.S., appeals from a Final Order and Decision of The Board of Governors of Registered Dentists of the State of Oklahoma (Board) issued on November 9, 1991, Case No. 91-017, wherein she was found to be in violated of Section 328.32(g) and Section 328.32(i) of The State Dental Act, 59 O.S.§§ 328.1-328.52, by her placement of an advertisement in the Yellow Pages of the Tulsa Southwestern Bell Telephone Directory.

The Court, having carefully considered the record in this case, and after hearing oral arguments, finds that Petitioner's advertisement stating that she is an advanced university and hospital trained specialist in anesthesiology and a Dentist Anesthesiologist is commercial speech protected by the First

Amendment to the U.S. Constitution and the Constitution of the State of Oklahoma. The Court further finds that only this portion of Petitioner's advertisement is before this Court.

IT IS THEREFORE ORDERED that the judgment and verdict rendered by the Board is hereby reversed, set aside, and held for naught.

THE COURT FURTHER ORDERS that Petitioner be restored to all rights lost by the rendition of the Decision and Order of the Board.

THE COURT FURTHER ORDERS the Board to expunge the private and public files maintained on Petitioner of any and all adverse comments placed there by the Board as a result of the November Decision and Order of the Board. Specifically, the Board is

Ordered to remove the letter of reprimand issued against Petitioner.

THE COURT FURTHER ORDERS that Petitioner's License to practice Dentistry in the State of Oklahoma be fully restored.

THE COURT FURTHER ORDERS that the Board immediately do all things necessary to void and expunge the comments and adverse action reported against Petitioner to the National Practitioners Data Bank.

THE COURT FURTHER FINDS that this is not an appropriate case for awarding attorney fees and costs to the prevailing party pursuant to 12 O.S. § 941.

IT IS SO ORDERED THIS 20th **day of** March, **1992.**

DONALD C. LANE, JUDGE OF THE DISTRICT COURT, 14TH JUDICIAL DISTRICT

Approved as to content and form:

Rabindranath Ramana,
Assistant Attorney General
State of Oklahoma
Attorney for Board of
Governors of Registered Dentists

Stephen R. Clark
Attorney and Special Prosecutor
For Board of Governors of
Registered Dentists

James E. Frasier
J. Townley Price
Sarah S. Brandon
Attorneys for Petitioner

APPENDIX A-17

EXHIBIT E

BEFORE THE BOARD OF GOVERNORS
OF REGISTERED DENTISTS
STATE OF OKLAHOMA

IN THE MATTER OF THE)
COMPLAINT AGAINST:) Case No. 91-017
)
LOIS IONE JACOBS,)
D.D.S.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came on for hearing on November 9, 1991 before the Oklahoma Board of Governors of Registered Dentists (the Dental Board) upon the complaint against Lois Ione Jacobs, D.D.S. (Dr. Jacobs). Dr. William E. Goodman, D.D.S., President of the Board, presided. Board members Jackson D. Haraway, D.D.S.; Terry D. Grubbs, D.D.S.; James E. Farley, D.D.S.; Bonnie Flannigan, R.D.H.; J.L. Kruska, D.D.S.; James D. Limestall, D.D.S.; Fred R. Lucas, Jr., D.D.S.; and Phyllis N. Turlington were present to hear

the case. The Board's investigatory officer, Joseph J. Massad, D.D.S., was also present but did not participate in the Board's decision. The Dental Board's case was presented by Stephen R. Clark. The Respondent Dr. Jacobs appeared in person and was represented by Mr. James E. Frasier, Mr. Townley Price, and Ms. Sarah Brandon. In conducting the hearing, the Board was advised by Assistant Attorney General Rob Ramana.

Having considered the allegations of the complaint and the evidence presented, the Dental Board issues the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. The Dental Board has issued to the Respondent, Dr. Jacobs, a license to practice dentistry, No. 4184.

2. Pursuant to Rule IV of its Rules and Regulations for Dental Assistants, Dental

Nurses, Dental Hygienists, and Dentists, the Dental Board has issued to Dr. Jacobs Permit No. 5 to administer conscious sedation. The Dental Board has also issued to Dr. Jacobs Permit No. 45 to administer general anesthesia. Neither Dr. Jacobs' license to practice dentistry nor her permits to administer conscious sedation and general anesthesia authorize her to represent herself as a specialist in anesthesiology.

3. On May 27, 1991, the Board received a complaint against Dr. Jacobs from a Dr. K.D. Parks. The complaint alleged, inter alia, that Dr. Jacobs had engaged in false and misleading advertising by placing a certain advertisement in the Southwestern Bell Yellow Pages for Greater Tulsa. Subsequently, the Board investigated the complaint against Dr. Jacobs through its regular investigatory procedures.

4. In September, 1991, the Board issued a formal complaint against Dr. Jacobs alleging several violations of the Oklahoma Dental Act, 59 O.S.Supp.1990, § 328.1, et seq. The matter was set for a hearing before the Dental Board.

5. At the November 9, 1991 hearing on the formal complaint against Dr. Jacobs, the following witnesses testified in support of the allegations in the Board complaint: Dr. Jacobs; Tom Boerschinger, the Assistant General Counsel for the American Dental Association; and Ms. Linda Campbell, the Board's Executive Director. In response to the allegations of the complaint, Dr. Jacobs testified in her own behalf. She also called the following witnesses: Jonathan D. Chancellor, M.D., Shirley Blades; James Snyder, D.D.S.; Cindy Jenswold, C.R.N.A.; and Lee Clark Johns.

6. Dr. Jacobs placed an advertisement in the Southwestern Bell Yellow Pages for Greater Tulsa, Oklahoma for the year 1990-91 that read as follows:

DENTIST
ANESTHESIOLOGIST

Where the dental chair almost becomes an easy chair. Available at YOUR OWN Dentist office, Sedation For Root Canals, Gum Treatment, Implants, Extractions, General Dentistry. Monitoring Of High Risk Patients Heart Disease - High Blood Pressure Cerebral Palsy Advanced University & Hospital Trained Specialist In Anesthesiology

Call----------835-6822

7. Dr. Jacobs placed the same advertisement in the 1991-92 Southwestern Bell Yellow Pages for Greater Tulsa, Oklahoma.

8. At the November 9, 1991 hearing, Dr. Jacobs testified as to her training and qualifications. Dr. Jacobs stated she

received a B.S. Degree in 1974 from the University of Iowa College of Pharmacy and a D.D.S. Degree from the University of Iowa College of Dentistry in 1978. Dr. Jacobs completed a two-year medical residency in the Department of Anesthesia at the University of Iowa Hospitals and Clinics in Iowa City, Iowa in 1980. Dr. Jacobs is a member of the American Society of Dentist Anesthesiologists and a Fellow of the American Dental Society of Anesthesiology. Dr. Jacobs acknowledged that, in none of this training and in none of these memberships, was she ever certified as a specialist in anesthesiology.

9. At the November 9, 1991 hearing, Mr. Tom Boerschinger, the Assistant General Counsel for the American Dental Association, testified that the American Dental Association's Counsel on Dental Education does not recognize a specialty within

dentistry in the field of anesthesiology. Mr. Boerschinger's testimony was confirmed by a letter from Judith A. Nix (the Assistant Director of Advanced Education for the American Dental Association's Counsel on Dental Education) to Linda Campbell, the Dental Board's Executive Director. Ms. Nix's letter states, "Dental anesthesiology is not a recognized dental specialty." Mr. Boerschinger's testimony and Ms. Nix's letter were not rebutted by Dr. Jacobs and the Board accepts this testimony and documentary evidence.

10. Mr. Boerschinger further testified that neither the American Society of Dentist Anesthesiologists nor the American Dental Society of Anesthesiology have petitioned the American Dental Association for recognition of dentist anesthesiology as a specialty. This testimony was not rebutted by Dr.

Jacobs; the Board finds it to be credible and accepts it.

11. At the November 9, 1991 hearing, Ms. Linda Campbell testified that Dr. Jacobs has never requested the Dental Board to issue her a specialty license. This testimony was not rebutted by Dr. Jacobs, and the Board finds it to be credible and accepts it.

12. At the November 9, 1991 hearing, the Board also considered testimony from several witnesses called by Dr. Jacobs. Dr. Chancellor testified as to the sufficiency of Dr. Jacobs' training. Ms. Blades testified as to the need for a specialty in anesthesia. Dr. Snyder testified as to his role in developing a model examination for potential use in specialty licensure in dental anesthesiology. Dr. Snyder further testified as to the use and importance of anesthesiology in the field of dentistry

generally. Ms. Jenswold testified as to confusion surrounding the term anesthesiologist and as to Dr. Jacobs' qualifications. Ms. Johns, a writing consultant with a Bachelor's and Master's Degree in English, testified that in her opinion, Dr. Jacobs yellow pages advertisement is not misleading because the information set forth in it is "verifiable". As set forth below, the Board finds the testimony of Drs. Chancellor and Snyder and Ms. Blades and Ms. Jenswold irrelevant to the issues in this case. The Board finds the testimony of Ms. Johns unpersuasive.

Conclusions of Law

1. 59 O.S.Supp.1990, § 328.15 directs the Dental Board to enforce the Oklahoma Dental Act. In light of § 328.15, the Board has jurisdiction over this matter.

2. Any Finding of Fact which is properly a Conclusion of Law is incorporated by reference and vice versa.

3. 59 O.S.Supp. 1990, § 328.32 authorizes the Board to issue reprimands, suspensions, and revocations against a licensed dentist who, inter alia: (1) is "guilty of dishonorable or unprofessional conduct" [328.32(g)]; (2) "holds himself out as especially qualified or limiting his practice to a branch of dentistry without a special license therefore" [328.32(i)].

4. 59 O.S.Supp.1990, § 328.22 provides:

> No person qualified to practice dentistry, as defined herein, shall announce and/or hold himself out to the public as limiting his practice to or as being especially qualified in any branch of dentistry without first having obtained a license therefore from the Board of Governors as hereinafter provided. The Board of Governors will, at its discretion, issue licenses in only those specialties as approved by the Council on Dental Education of the American Dental Association.

5. Rule VI of the Dental Board's Rules on Examination and Licensure states that only the following specialties are recognized by the Board: Oral and Maxillofacial Surgery; Orthodontics; Pedodontics, Periodontics; Prosthodontics; Endodontics; and Oral Pathology.

6. Rule IV of the Board's Rules for Dentists and Dental Hygienists authorizes the Board to grant permits to dentists to administer conscious sedation and general anesthesia. However, under the provisions of Rule IV, permits to administer conscious

sedation and general anesthesia may be issued only to dentists who meet certain educational requirements and who maintain properly equipped facilities, as determined by the Board. As a result, under Rule IV, conscious sedation and general anesthesia may be administered only at specific dental offices that have been approved by the Board for the administration of such procedures.

7. By placing an advertisement in the 1990-91 Southwestern Bell Yellow Pages for Greater Tulsa in which she described herself as a "dentist anesthesiologist" and as an "Advanced University and Hospital Trained Specialist in Anesthesiology", the Respondent Dr. Jacobs violated 59 O.S.Supp.1990, § 328.32(i).

8. By placing the 1990-91 advertisement in the Southwestern Bell Yellow Pages for Greater Tulsa and describing herself as

a "dentist anesthesiologist" and an "Advanced University and Hospital Trained Specialist in Anesthesiology", the Respondent Dr. Jacobs also violated 59 O.S. § 328.32(g) by committing dishonorable and unprofessional conduct.

9. By placing the subject advertisement in the 1990-91 Yellow Pages for Greater Tulsa and stating in that advertisement that her services involving the administration of anesthesia are "available at your own dentist's office" when these services of Dr. Jacobs are, in fact, only available at particular dentist's offices that have been approved by the Board to administer conscious sedation and general anesthesia, the Defendant Dr. Jacobs violated 59 O.S.Supp. 1990, § 328.32(g) by committing dishonorable and unprofessional conduct.

10. The Dental Board's application of the Oklahoma Dental Act to the subject advertisement placed by Dr. Jacobs is not precluded by the First Amendment to United States Constitution. Restrictions on the use of the word "specialist" by dentists who are not licensed as specialists have been upheld over First Amendment challenges. See Parmley v. Missouri Dental Board, 719 S.W.2d 745 (Mo. Banc. 1986). The Board finds cases such as Parmley applicable here. In addition, the Board's application of the state Dental Act to Jacobs' advertisement in no way limits Dr. Jacobs' right to properly and accurately state her credentials in advertising.

11. The Board finds it legally insignificant that the individual who filed the initial complaint against Dr. Jacobs, Dr. K.D. Parks, did not testify in person at the November 9, 1991 hearing. To be sure, Rule

V of the Board's Public Rules on Hearings does state, "If Respondent denies the allegations, the Board shall proceed to hear sworn testimony from the complainant and any witnesses in support of the complaint, and all testimony or evidence offered on behalf of the Respondent." However, the Board finds that this provision does not require the initial complainant to testify in person in every case brought before the Board. Under the Board's Rules for Hearings, the Board retains the discretion to admit only competent, relevant, and probative evidence. Moreover, the Board's attorney retains discretion to present the evidence in support of the allegations of the formal complaint in the manner that he or she deems appropriate. In this instance, the allegations against Dr. Jacobs are based on the text of the 1990-91 Southwestern Bell Yellow Pages advertisement.

The advertisement speaks for itself, and Dr. Parks live testimony is not essential to support the allegations of the complaint. In addition, the Board notes that Dr. Parks' deposition was introduced into evidence at the hearing. Dr. Parks' deposition was taken under oath, and therefore his deposition testimony constitutes "sworn testimony from the complainant" under the terms of Public Rule V. Therefore, the fact that Dr. Parks did not testify in person does not defeat the allegations of the Board complaint against Dr. Jacobs.

12. The Board finds the testimony presented by Dr. Jacobs from Drs. Chancellor and Snyder and Ms. Blades and Ms. Jenswold irrelevant to the issues in the instant case. None of this testimony rebutted the fact that, in the advertisement placed by Dr. Jacobs, she represented herself as a dentist

anesthesiologist and an advanced university and hospital trained specialist in anesthesiology when such a specialty is not recognized by the American Dental Association or the State Dental Board.

In addition, the Board finds the testimony of Ms. Clark Johns unpersuasive. As noted above, Ms. Johns testified that the advertisement in question was not misleading because it was "verifiable." By "verifiable", Ms. Johns apparently meant that an individual reading the advertisement could make a subsequent investigation and determine what exactly Dr. Jacobs meant by the particular statements that she made there. However, under the provisions of the Oklahoma State Dental Act, what must be considered by the Board is the language used in the advertisement itself. That language unequivocally describes Dr. Jacobs as a dentist

anesthesiologist and as a specialist. The fact that an individual could read the advertisement and find out by a subsequent investigation that Dr. Jacobs did not actually have a specialty license does not render the advertisement any less misleading and does not rebut the evidence that establishes that Dr. Jacobs violated the State Dental Act by so placing the advertisement.

Order

In light of the violations set forth above, the Board issues the following order of reprimand and probation against the Respondent Dr. Jacobs:

1. Dr. Jacobs is hereby formally reprimand. A written reprimand will be placed in Dr. Jacobs' Board file.

2. In addition, the dental license of the Respondent Dr. Jacobs is hereby placed on

probation for a period of two (2) years beginning on November 9, 1991 and concluding on November 9, 1993. During the period of probation, Respondent Dr. Jacobs shall comply with all provisions of the State Dental Act and the Dental Board's rules.

All participating members vote "aye".

IT IS SO ORDERED.

_____

WILLIAM GOODMAN, D.D.S.
PRESIDENT, OKLAHOMA BOARD OF
GOVERNORS OF REGISTERED DENTISTS

State of Oklahoma)
County of Oklahoma) ss

Subscribed and sworn to before me this 23rd day of December, 1991.

S/Glenda Goodman
Notary Public
My commission expires:
3-16-93

EXHIBIT F

Okla. Stat. tit. 59 § 328. 22. Specialist License

No person qualified to practice dentistry, as defined herein, shall announce and/or hold himself out to the public as limiting his practice to, or as being especially qualified in, any branch of dentistry, without first having obtained a license therefor from the Board of Governors as hereinafter provided. The Board of Governors will, at its discretion, issue licenses in only those specialties as approved by the Council on Dental Education of the American Dental Association. The issuing of a specialist license by the Board of Governors is a special privilege granted to that member, which allows him to announce to the public that he is especially qualified in a particular branch of dentistry. Any member granted this special privilege must

limit his practice to the specialty in which he is licensed, or said specialist's license may be revoked or suspended, as herein provided. The Board of Governors, upon satisfactory proof that a member is a graduate in one of the recognized specialties of dentistry from a school or educational program approved by the Council on Dental Education of the American Dental Association, and, in addition thereto, such formal education and/or professional knowledge and experience that the Board of Governors, by rule, considers necessary to maintain the graduate standards according to present day specialists' training programs, may issue a license to any member, authorizing such member to hold himself out and announce to the public that he is especially qualified and limits his practice to, and gives special attention in, any one of the recognized

branches of the dental profession. Examinations shall be theoretical and practical. The theoretical examinations shall be in writing and include all the subjects represented in the different branches of approved graduate schools. Written examinations may be supplemented with an oral examination. Demonstration of the applicant's skill is also required. A special license shall be required for the practice of each recognized branch of dentistry in order for the member to hold himself out to the public as limiting his practice to, and being specially qualified in, any branch of dentistry. The fee for such examination and special license shall be fixed annually by the Board of Governors, but shall not exceed Three Hundred Dollars ($300.00). Any applicant failing to pass such examination shall be entitled to one

additional examination for an additional fee as required by the Board of Governors, but not to exceed Three Hundred Dollars ($300.00).

Okla. Stat. tit. 59 § 328.32

Revocation or Suspension of License to Practice Dentistry.

The Board of Governors shall have power, after a hearing for any causes now existing in the laws of the State of Oklahoma, or for a violation of any acts prohibited herein, to revoke a license of a dentist to practice dentistry, or a specialist license of a dentist, or to suspend the use of the same, or to discipline by probation or reprimand, public or private; and the Board of Governors shall have power to pass upon all petitions for reinstatement. The Board of Governors shall keep a record of the evidence and

proceedings in all matters involving the revocation of a license or suspension, probation or reprimand, and shall make findings of fact and a decision thereon. Upon the making of any decision to revoke a license or to suspend a member hereof from practice, or place him or his license under probation, or reprimand a member hereof, the Board of Governors shall immediately forward a certified copy of said decision to the member involved by registered mail, to his last-known business address. Such decision shall be final, unless such member hereof whose license is revoked, suspended, placed under probation, or who is reprimanded, shall have the right of an appeal as provided in this act. In the event an appeal is not taken within the provisions of this act, the Board of Governors shall make and enter an order striking the name of such person from

the roll of membership hereof, or suspending him for the period mentioned in said decision or otherwise carrying out provisions of said decision and shall so notify said member thereof. The Board of Governors shall have power to revoke the license of a member hereof, suspend the member from the practice, reprimand or order a period of probation of said member upon the following grounds:

(a) Upon presentation to the Board of Governors of a certified copy of a court record showing that the member hereof has been convicted of a crime involving turpitude;

(b) Has presented to the Board of Governors a false diploma, license or certificate, or one obtained by fraud or illegal means;

(c) By reason of persistent inebriety, or addiction to drugs, the member is rendered

incompetent to continue the practice of dentistry;

(d) Has been guilty of false, fraudulent or misleading advertising, as herein prohibited;

(e) Has permitted, directly or indirectly, by knowledge or acquiescence, an unregistered or unlicensed person to practice dentistry and/or dental hygiene;

(f) Has permitted a dental hygienist to perform any operation other than as authorized by the Board of Governors;

(g) Has been guilty of dishonorable or unprofessional conduct;

(h) Has failed to pay registration fee as herein provided;

(i) Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor;

(j) Is a menace to the public health by reason of a communicable disease;

(k) Is a menace to the public health by reasons of unsanitary offices, practices, or techniques;

(l) Has been proven mentally unsound or has been admitted to a mental institution, either public or private, and until he is proven mentally competent;

(m) Is grossly immoral;

(n) Is incompetent in the practice of dentistry;

(o) Is guilty of willful negligence in the practice of dentistry;

(p) Is guilty of division of fees, or agreeing to split or divide the fee received for dental service with any person for bringing or referring a patient without the knowledge of the patient or his legal representative;

(q) Has been convicted of violating or has willfully violated the federal or state narcotic or barbiturate laws or has been committed for treatment for drug addiction to an institution, either public or private, and until he has proven himself cured;

(r) Is guilty of using or attempting to use the services of a dental laboratory or dental laboratory technician without issuing a written authorization;

(s) Is guilty of aiding or abecting or encouraging a dental hygienist employed by him to make use of an oral prophylaxis list, or the calling by telephone or by use of letters transmitted through the mails to solicit patronage from patients formerly served in the office of any dentist formerly employing such hygienist;

(t) Is guilty of having more than two dental hygienists per dentist;

(u) Is guilty of patronizing or using the services of any dental laboratory or dental laboratory technician in this state unless such dental laboratory or dental laboratory technician shall have first complied with the provisions of the act regulating dental laboratories and dental laboratory technicians;

(v) Has placed a dental appliance in the mouth without first having a written authorization from the dentist who caused same to be constructed;

(w) Has authorized, permitted or allowed his or her dental hygienist, dental nurse, dental assistant, or dental laboratory technician to violate any provision of this act or any rules and regulations of the Board of Governors, or has violated any of the provisions of this act.

Supreme Court, U.S.
FILED
APR 26 1994
OFFICE OF THE CLERK

No. 93-1435

In The

Supreme Court of the United States

October Term, 1993

THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA,

Petitioner,

vs.

LOIS JACOBS, D.D.S.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the Oklahoma Board of Governors of Registered Dentists may prohibit a general dentist from stating in an advertisement the services she is legally permitted to perform?

2. Whether the Oklahoma Board of Governors of Registered Dentists may prohibit a general dentist from accurately and truthfully stating in an advertisement that she is an "Advanced University & Hospital Trained Specialist in Anesthesiology"?

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No. 93-1435

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RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Article 2, § 22 of the Constitution of the State of Oklahoma provides:

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

The Oklahoma Dental Act, 59 Okla. Stat. §§ 328.1-328.52 (Okla. Stat. Ann., West 1989), provides in pertinent part at Section 328.32 the following:[1]

> The Board of Governors shall have power, after a hearing for any causes now existing in the laws of the State of Oklahoma, or for a violation of any acts prohibited herein, to revoke a license of a dentist to practice dentistry, or a specialist license of a dentist, or to suspend the use of the same, or to discipline by probation or reprimand, public or private . . . upon the following grounds:
>
> (g) Has been guilty of dishonorable or unprofessional conduct;
>
> (i) Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor;

---

1. The full text of 59 Okla. Stat. § 328.32 is set out in Petitioner's Appendix F, A39-A45.

STATEMENT OF THE CASE

This case arises out of an advertisement for professional services in dentistry that Dr. Lois Jacobs, D.D.S., placed in the yellow pages of the Tulsa, Oklahoma, Southwestern Bell Telephone Directory. Dr. Jacobs first placed the ad in the telephone directory in 1986 when she left academic dentistry and medicine to enter competitive private practice in Tulsa, Oklahoma. She has renewed the ad each year.

Dr. Jacobs' ad is listed under the heading of "general dentists" and conveys to the public the nature of her fully lawful practice and specifically what she has done to qualify in her field. The words used in the ad at issue are "Dentist Anesthesiologist" which appear at the top of the ad, and "Advanced University & Hospital Trained Specialist in Anesthesiology" which appear at the bottom of the ad. (P. App. E at 21, no. 6).

A. Dr. Jacobs' Professional Credentials Are Above Reproach.

Due in part to Dr. Jacobs' exceptional training and unique dental practice, the facts of this case are complex. When the case commenced, Dr. Jacobs was the only dentist in the State of Oklahoma who, upon completion of dental college, entered and successfully completed a two-year medical residency in anesthesia at the University of Iowa Hospitals and Clinics for which she, along with the M.D. candidates, received advanced certification in anesthesia.

The University of Iowa medical residency program in anesthesia is accredited by numerous authorities, including the Council for Graduate Medical Education, the American Board of Medical Specialties, and the American College of Anesthesiology. The training is recognized throughout the world as qualifying medical practitioners as specialists in anesthesia. (Board Hearing Transcript 113-115: Tes. of J. Chancellor, M.D.).

Dr. Jacobs is a member and officer of the American Society of Dentists Anesthesiologists, a national organization composed of dentists who have two or more years of accredited post-graduate specialty education in anesthesiology. The members of this organization are recognized by state agencies, federal agencies, state dental societies and national insurance carriers as a highly qualified group of dentists with special training and expertise in anesthesiology, (Board Hearing Transcript 154-159: Tes. of J. Snyder, D.D.S., Dentist Anesthesiologist, Alexandria, Va.).

Dr. Jacobs is also a Fellow in General Anesthesia of the American Dental Society of Anesthesiology (ADSA). The Oklahoma Dental Board explicitly recognizes in its Rules and Regulations that such "fellows" have special training and experience in the use of anesthesia in dentistry. (Record at 237; Rule IV(4)B3 of Rules and Regs. for Dentists, Feb. 1988).

From 1981 to 1985 Dr. Jacobs held joint teaching appointments in the College of Dentistry and the College of Medicine at Oral Roberts University (ORU), and served as the University's Director of Dental Anesthesiology. The Dental School and the Medical School at ORU were fully accredited by state and national accrediting commissions.

Upon leaving academic medicine and dentistry in 1986, when ORU closed both its College of Dentistry and its College of Medicine, Dr. Jacobs entered private competitive practice in dentistry and placed the advertisement in the telephone directory.

Because of her special training and expertise in anesthesia, Dr. Jacobs limits her dental practice to providing anesthesia services for dentistry. Her practice consists of going to another dentist's office where she administers anesthesia and monitors a dental patient while the other dentist performs the necessary dental procedures. The service she provides allows a patient to have

procedures performed safely by their own dentist that otherwise would have to be done in a hospital or in an oral surgeon's office. According to the testimony of experts, the health and welfare of patients is best served by having two clinicians in attendance when anesthesia is required for a patient. (Board Hearing Transcript: Testimony of J. Chancellor, M.D. at 120, Testimony of J. Snyder, D.D.S. at 156).

B. Dr. Jacobs' Dental Practice Is Fully Authorized By The State.

Dr. Jacobs does not hold a "specialty license" in dentist anesthesiology because one does not exist. Under Section 328.22 of The State Dental Act, 59 Okla. Stat. §§ 328.1-328.52, the Dental Board recognizes and issues specialty licenses only in areas "approved by the Council on Dental Education of the American Dental Association."[2] Although The American Dental Association (ADA) recognizes eight (8) fields of specialty in dentistry, Oklahoma recognizes only seven (7). (Rule VI of Rules and Regs. for Dentists; P. App. E at A27, no. 5). Those areas eligible for specialty licenses in Oklahoma are oral and maxillofacial surgery, orthodontics, pedodontics, periodontics, prosthodontics, endodontics, and oral pathology. (The ADA also recognizes public health as a dental specialty). When the Oklahoma Dental Board grants a specialty license, the practitioner must limit his or her practice to that one field and may only advertise in the classified section of a telephone directory under that specialty. 59 Okla. Stat. § 328.28A(2). However, a general dentist may perform dental services in any field of dentistry, and may advertise in the yellow pages those services as long as the ad is listed under "general dentists" and not under a specialty.

The anesthesiology services that Dr. Jacobs provides, and

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2. The text of 59 Okla. Stat. § 328.22 appears in Petitioner's Appendix F, A36-A39.

which she advertises under "general dentists," are fully authorized by the state. She holds all the special licenses, certificates and permits required and issued by the Dental Board or the state to engage in this practice. Her Oklahoma dental license No. 4184 was first issued in 1980 and renewed each year thereafter. She also holds general anesthesia permit No. 45 and conscious sedation permit No. 5. (P. App. E at 18-19, no. 1 and 2). These permits and license are all issued by the Dental Board and have never been revoked, suspended, or the subject of any disciplinary proceeding prior to this action.

C. The State Dental Board Action.

In May of 1991, solely upon a complaint received from a Tulsa dentist, the Dental Board brought formal charges against Dr. Jacobs for her advertisement. (P. App. E at 19, no. 3). The formal complaint, Case No. 91-017, contained only the following specific allegations:

> 1. Jacobs has announced and held herself out to the public as limiting her practice or as being especially qualified as a specialist in Anesthesiology including a certain advertisement placed in the Southwestern Bell Yellow pages in and for the City of Tulsa, Tulsa County, Oklahoma.
>
> 2. That Jacobs has not obtained a license pursuant to 59 O.S. § 328.22 from the Board of Governors to allow her to hold herself out to the public as being specially qualified as a specialist in Anesthesiology.
>
> 3. That neither the Board of Governors nor the Council on Dental Education of the American Dental Association either recognize a specialty

or approve a specialty of anesthesiology for Dentists.

4. That the acts and actions of the Respondent set forth in paragraphs 1 through 3 constitute dishonorable or unprofessional conduct and are therefore a violation of 59 O.S. § 328.32(g).

5. That the acts and actions of the Respondent set forth in paragraphs 1 through 3 constitute holding herself out as especially qualified in or limiting her practice to a branch of dentistry without a special license are, therefore, a violation of 59 O.S. § 328.32(i).

At the conclusion of the Dental Board proceedings, the Dental Board found Dr. Jacobs, because of her ad, guilty of two violations of the State Dental Act: Namely, § 328.32(i) — Holds himself out as especially qualified in or limiting his practice to a branch of dentistry without a special license therefor; and, by reason of such "holding out," also guilty of violating § 328.32(g) — Has been guilty of unprofessional conduct. (Board Hearing Transcript 242-245). The Dental Board ordered that Dr. Jacobs be disciplined by (1) a written reprimand be placed in her professional public file, and (2) Dr. Jacobs' dental license be placed on probation for a period of two years. In addition, the Dental Board sent a report concerning this action against Dr. Jacobs to the National Practitioner Data Bank stating that Dr. Jacobs had engaged in "false, fictitious, and misleading advertisement."3

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3. Dr. Jacobs was neither charged nor found in violation of Sec. 328.32(d) of Okla. title 59 which provides — "Has been guilty of false, fraudulent or misleading advertising, as herein probibited." (Text of 59 Okla. Stat. § 328.32 appears at Petitioner's Appendix F, A39-A45).

Pursuant to Title 59 Okla. Stat. § 328.43 of the Oklahoma Dental Act and section 318 *et seq.* of the Oklahoma Administrative Procedures Act, 75 Okla. Stat. §§ 301-325, Dr. Jacobs filed a timely appeal to the Tulsa County District Court. (D.C. No. CJ-91-5201). The District Court after reviewing the record, being fully briefed, and hearing oral arguments, reversed the decision of the Dental Board, ordered the record expunged, including the report to the National Practitioners Data Bank, and fully restored all Dr. Jacobs' professional rights.

The trial court found Dr. Jacobs' ad to be commercial speech protected by the First Amendment to the United States Constitution and the Oklahoma Constitution. (Record at 381-384; P. App. D, A12-A16).

Upon appeal, the Oklahoma Court of Appeals, Division 4, affirmed the Tulsa County District Court in an unpublished memorandum opinion dated August 10, 1993. (Case No. 79,315; P. App. B, A2-A10). The Dental Board's Petition for Rehearing was denied on September 10, 1993. (P. App. C at A11). And, on November 23, 1993, the Dental Board's Petition for a Writ of Certiorari in the Supreme Court of Oklahoma was denied. (P. App. A at A1).

REASONS FOR DENYING THE WRIT

The decision of the Oklahoma Court is correct and follows the applicable decisions of this Court. There are no new, special, or important issues raised in this case warranting Supreme Court review. Additionally, the Oklahoma trial court's decision was based upon substantial issues of state law as well as the federal law.

Dr. Jacobs' advertisement contains truthful statements describing a lawful professional dental practice. The facts stated in the ad, which relay to the public what she has done to qualify

herself to engage in her dental practice, are readily verifiable. To suggest that a certificate of medical residency from a state university medical school is not a bona fide document is without merit.

Dr. Jacobs would also advise the Court that in January 1994, the Council on Dental Education of the American Dental Association (ADA) recommended that the application of the American Society of Dentists Anesthesiologists (ASDA) for the creation and recognition of a dental specialty in dental anesthesiology be approved by the 1994 ADA House of Delegates. Favorable action by the ADA House of Delegates is expected in October of this year. Such action may render the issue of "specialist" in this particular case moot.

I.

THE RULING IN THIS CASE IS FULLY IN ACCORD WITH DECISIONS OF THE UNITED STATES SUPREME COURT CONCERNING GOVERNMENT REGULATION OF COMMERCIAL SPEECH.

In a 1990 commercial speech case dealing with the right of professionals to advertise, this Court determined that an Illinois attorney had a First Amendment right to place upon his letterhead that he was certified as a specialist by a private professional organization. *Peel v. Attorney Disciplinary Com.*, 496 U.S. 91 (1990). This Court held that a state rule which completely prohibited such advertising and provided censure for violation of the rule was overbroad.

In *Peel*, this Court found that the attorney was engaged in a lawful activity, that his certification by the National Board of Trial Advocacy (NBTA) was true and verifiable, and that the NBTA was a bona fide organization with "objective and consistently applied

standards relevant to practice in a particular area of the law." *Id.* at 109.

Like *Peel,* Dr. Jacobs is engaged in a lawful practice. She is authorized by the Dental Board to practice dentistry and to provide anesthesia service in dentistry. While Dr. Jacobs does not hold a "specialty" license in dental anesthesia because there is none, she does hold all the special licenses, certificates, and permits that the State of Oklahoma issues or requires. Furthermore, the Dental Board explicitly recognizes that Dr. Jacobs, as a Fellow in General Anesthesia of the ADSA, is especially qualified in the field of anesthesia by reason of substantial post graduate training.

Dr. Jacobs' ad does not use the term "specialist" in an unqualified manner. The term is modified by "Advanced University & Hospital Trained [Specialist] in Anesthesiology." Her anesthesia medical residency certificate, from a program conducted by the University of Iowa College of Medicine and approved by the American Board of Medical Specialists, is on file with the Dental Board. Any consumer or member of the public desiring verification of Dr. Jacobs' training can do so easily. Her statements tell the public what service she offers and what she has done to qualify herself in her field of practice. The statements are of objective facts.

This Court has also recognized that information of the kind in Dr. Jacobs' ad may be of significant value to society. In *Bates v. State Bar of Arizona,* 433 U.S. 350, at 364 (1977), this Court stated:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . Advertising, though entirely commercial, may often carry information of import to significant issues of the day.

II.

THE RULING IN THIS CASE IS FULLY IN ACCORD WITH OTHER DECISIONS OF THE OKLAHOMA COURTS.

The Dental Board cites *Steelman v. Oklahoma State Board of Medical Licensure and Supervision,* 824 P.2d 1142 (Okla. App. 1992), as an inconsistent decision. This alleged conflict can be distinguished upon the facts.

In *Steelman,* an Oklahoma physician who attended a three day seminar in "bariatric" medicine sought permission to hold himself out as board certified by the American Board of Bariatric Medicine. The Rules of the Oklahoma Board of Medical Licensure provide that physicians may claim to be board certified only if they have completed the requirements for certification by a member board of the organization of American Board of Medical Specialties or by an organization found by the board to be equivalent. The Medical Licensure Board concluded that the American Board of Bariatric Medicine was not a member board of ABMS and that the three day training course was not equivalent training.

The Oklahoma Court of Appeals upheld the Medical Board's decision. The court found as follows:

> . . . while Steelman is entitled to commercial free speech, the right is not absolute. The Board, as an arm of the State seeking to protect the public's health and safety may make reasonable restrictions on Steelman's right to advertise himself as "board certified". He may not so advertise himself, when he has not met

> the reasonable requirements set by the Board to do so.

Id. at 1144-1145.

Unlike the physician in *Steelman* whose credentials consisted of attending a three day seminar, Dr. Jacobs was trained in a two-year program certified by the American Board of Medical Specialties. If the physician in *Steelman* had presented Dr. Jacobs' credentials, he would have prevailed.

In addition, the Dental Board explicitly recognizes that because Dr. Jacobs is a Fellow in General Anesthesia of the American Dental Society of Anesthesiology she has special training and experience in the use of anesthesia in dentistry. Dr. Jacobs clearly meets the requirements of *Steelman*. The decisions in these cases are not in conflict.

III.

THE RULING IN THIS CASE IS FULLY IN ACCORD WITH DECISIONS OF OTHER LOWER COURTS.

The Petitioner asks this Court for Certiorari because of an alleged conflict between the decision in the case at bar and *Parmley v. Missouri Dental Board,* 719 S.W. 2d 745 (Mo. banc. 1986). The facts in this instant case are quite different from those in *Parmley.* The dentist in *Parmley* was seeking a specialty license in pedodontics, one of the eight dentistry specialties, without having to take and pass the required examination and without having met the educational requirements.

Dr. Jacobs is in an entirely different position. She has the highest credentials and certification that can be obtained in her field — no dentist in Oklahoma has more formal education in

anesthesiology. And, Dr. Jacobs has not been turned down for a specialty license. There is no dentistry specialty license in anesthesiology for which she could apply.

In the event there is a conflict between the *Parmley* decision and this Court's decision in *Peel,* then this Court's decision in *Peel,* decided two years later, would take precedence.

CONCLUSION

Based upon all of the foregoing reasons, Respondent prays that the Court deny the Oklahoma Dental Board's Petition for Writ of Certiorari. Dr. Jacobs respectfully submits that the opinion below was correct and proper and should not be disturbed.

Respectfully submitted,

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